

CCDLA
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**Connecticut Criminal Defense
Lawyers Association**
P.O. Box 1766
Waterbury, CT 07621-1776
(860) 283-5070 Phone/Facsimile
www.ccdla.com

March 11, 2011

March 4, 2011

The Honorable Eric D. Coleman
The Honorable Gerald M. Fox.
Chairmen
Joint Committee on Judiciary
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: Raised Bill No. 6344, An Act Concerning Eyewitness Identification

Dear Chairmen and Committee Members:

My name is Lisa J. Steele. For the past fifteen years, I have represented indigent criminal defendants in appeals to the Connecticut Supreme and Appellate Courts. I have been involved in eyewitness identification litigation since 1998 both as a party and as amicus counsel. I have written various articles about eyewitness identification issues and taught numerous CLE classes in several states. I am writing on behalf of the Connecticut Criminal Defense Lawyers Association.

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of 350 lawyers dedicated to defending people accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally, and that those rights are not diminished.

CCDLA strongly supports and recommends the passage of Raised Bill No. 6344, *An Act Concerning Eyewitness Identification*. A requirement that law enforcement adopt procedures already in use in states like Massachusetts, New Jersey, North Carolina, in some law enforcement agencies like Dallas and Austin, Texas, and pending in Rhode Island, will decrease the likelihood that an identification procedure will result in a wrongful arrest and conviction. See New Jersey Attorney General, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001); Fisher, *Eyewitness Identification Reform in Massachusetts*, 91:2 MASS. L. REV. 52 (2008). When the wrong defendant is prosecuted, not only is this a tragedy for the innocent person, but the true culprit remains at large to perpetrate more crimes in the community.

In Massachusetts, reforms similar to those proposed here are credited with improving conviction rates. See Murphy, *DA Brings in Wins in Homicide Cases: Conley Credits New Procedures*, BOSTON GLOBE, Apr. 12, 2009, at B1. See also Gaertner & Harrington, *Successful Eyewitness*

Identification Reform: Ramsey County's Blind Sequential Lineup Protocol, POLICE CHIEF, Apr. 2009, at 26 (experience of Minnesota department with blind, sequential ID procedures).

In addition, the reforms are likely to save money in the long run, by reducing the need for motions to suppress identifications and for defense experts to testify about the potential flaws in the traditional procedures in hearings and at trial. This will likely save time and money for the court system, prosecutors, public defenders, and police departments. The cost of implementing this proposal can be quite small. The benefits are enormous.

1. Mistaken Identification Remains the Leading Factor in Wrongful Convictions.

In *State v. Ledbetter*, 275 Conn. 534 (2005), our Supreme Court recognized “the inherent risks of relying on eyewitness identification” and noted concerns raised by the United States Supreme Court in 1967. The Innocence Project notes that eyewitness identification mistakes were found in 75% of the 255 exoneration cases including Calvin Tillman’s case here in Connecticut. Unfortunately, DNA is found in a minority of cases. Larry Miller served over ten years in jail before the true culprit came forward in 1997 providing details that convinced the habeas court that he was innocent. See *Miller v. Commissioner of Correction*, 242 Conn. 745 (1997). The DNA exonerations are the canary warning us that there is a large problem that is likely to remain unresolved unless reforms are made.

Chief State’s Attorney Kane, testifying before this Committee on March 10, 2010, said that “We don’t take eye witness identifications lightly. We’re all highly concerned about it.” The problem before this Committee is to translate that concern into action. The Chief State’s Attorney and the Connecticut Police Chiefs Association have been studying this issue for the past 12 years. It is time to move forward.

As the *Ledbetter* court also recognized that “eyewitness identification remains a vital element in the investigation and adjudication of criminal acts”. It is because of this vitality that proper procedures are critical to a proper police investigation focused on the true culprit and not delayed by building a case against an innocent person.

2. Traditional Eyewitness Identification Procedures: The Science and the Problem.

One of the best introductions to eyewitness identification science and the law can be found a report by a New Jersey judge assigned to prepare a report in this area. Justice Palmer, writing separately in *State v. Outing* refers several times to G. Gaulkin, Report of the Special Master, *State v. Henderson*, New Jersey Supreme Court, Docket No. A-8-08 (June 10, 2010), available at [http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20\(00621142\).PDF](http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF)

Judge Gaulkin reviewed the research in this area and concluded that “Of all the substantive uses social science in law . . . nowhere is there a larger body of research than in the area of eyewitness identification.” Special Master’s Report at 9. There are thousands of published, peer-reviewed papers in major psychology journals discussing

eyewitness identification. These papers come to a general consensus on key issues, including those raised in this Bill.

Not only is there is ample solid science in the eyewitness identification field to support this legislation, similar principles are found in the traffic safety and accident reconstruction field and in Dewar & Olson, *HUMAN FACTORS IN TRAFFIC SAFETY* (2d Ed. 2007); Olson & Faber, *FORENSIC ASPECTS OF DRIVER PERCEPTION AND RESPONSE* (2003); Shinar, *TRAFFIC SAFETY AND HUMAN BEHAVIOUR* (2007), but also in research and training on use-of-force by police officers and reconstruction of officer-involved shooting incidents. See Dept. of Justice, *VIOLENT ENCOUNTERS: FELONIOUS ASSAULTS ON AMERICA'S LAW ENFORCEMENT OFFICERS*, 61-73 (2007). This bill is supported by good, solid science.

To the extent that opponents of this bill disagree or argue that the science is not yet definitive, CCDLA suggests this Committee ask the opponents to provide specific citations to the materials which they feel support their skepticism. The eyewitness identification research which underlies this Bill has been found persuasive by the Department of Justice, various state task forces, numerous police departments and law enforcement agencies, and many courts including Connecticut appellate courts. To dismiss the research in this area as merely academic studies of undergraduate students does a disservice to Connecticut's residents.

The undersigned would note that last spring, she co-taught a program for Massachusetts attorneys on eyewitness identification along with, among others, two Boston-area prosecutors and a Deputy Chief of Police from a Boston suburb. The prosecutors gave a presentation supporting procedures very similar to those in this bill which are in use in Massachusetts. The Deputy Chief of Police talked about how the reforms had been implemented by his department. Written materials can be found at MCLE, *Identification Issues in Criminal Cases* (2010) at www.mcle.org. The reforms proposed here are working in Massachusetts – they can work in Connecticut.

Opponents of this bill may suggest that legislation is not needed – law enforcement can adopt procedures on its own. First, CCDLA notes that the Department of Justice first recommended many of the procedures contained in this bill in 1999. The State's Attorneys and police departments have had twelve years to study and implement reforms and have largely not done so. The procedures adopted seven years ago in response to *State v. Ledbetter* are a good start, but they do not address many of the reforms in this Bill. Second, to the extent that some departments have voluntarily adopted some reforms, their adoption has been inconsistent and haphazard. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91:2 MASS. L. REV. 52, 65 (2008). The reliability of a vital investigative procedure should not depend on where a crime occurs – uniform procedures incorporating well-settled science will best serve Connecticut's citizens. It is time for legislation.

A. General Recommendations.

In 1999, the Department of Justice published *EYEWITNESS IDENTIFICATION: A GUIDE FOR LAW ENFORCEMENT* based upon the recommendations of a task force of prosecutors, defense attorneys, police officers, and researchers. The Guide recommended many of the procedures in subsections (3)(A) and (3)(B), (4), (5), (6), (7), (8), (10), (12), (13) and (14) – indeed, the bill's language is virtually identical to the

Department of Justice's advice given twelve years ago. These portions of this bill are well supported by research. There is no dispute among researchers about these general provisions. They have been adopted by numerous law enforcement agencies across the country and should be adopted without hesitation in Connecticut.

B. Double-Blind Procedures

A test is "blind" when the test subject does not know the expected answer. A test is "double-blind" when neither the person taking the test nor the person giving the test know the expected answer. Double-blind procedures are standard and uncontroversial in many areas of science. A double-blind identification procedure would mean that the police officer administering the line-up or photo array would not know which image is the suspect. He or she could not inadvertently give a verbal or nonverbal cue to the witness about who he or she ought to pick.

This is not a difficult or expensive process. As Chief State's Attorney Kane noted in his written testimony in 2010, identification procedures in Connecticut "virtually always" involve the use of photographs. A "live" lineup is an extreme rarity in Connecticut. For photo arrays, a police officer could place the photographs of the suspect and filler in manila envelopes and hand them to the witness to view, telling the witness not to let the officer see which photographs he or she is looking at and then to initial the one he or she picks. The "folder method" was first suggested in 1999, and has been successfully used by several departments. See Klobuchar, et als, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 409, 411 (2006); RHODE ISLAND EYEWITNESS IDENTIFICATION TASK FORCE REPORT (2010) at 8, n. 14. It is not expensive and requires nothing more than standard office supplies.

The Department of Justice Task Force considered, but did not recommend double-blind identification procedures in 1999. See Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000). In the intervening 12 years, additional research clearly supports the use of double-blind procedures where feasible.

The State seems to agree. The Chief State's Attorney's Law Enforcement Council sought the benefits of double-blind procedures without openly recommending them: "Avoid using words, gestures, or expressions which could influence the witness' selection. If practical, especially during a photo array, take a position where the witness cannot see you. If the witness makes an ID, refrain from making any comment on the witness' selection." Letter from Chief State's Att'y Morano to Comm'r Boyle, Connecticut State Police (Sept. 23, 2005) (reproduced in Attorney Kane's written testimony in 2010). Last year, Chief State's Attorney Kane expressed his support for the use of double-blind procedures in testimony before this Committee on March 10, 2010.

The Supreme Court in *State v. Marquez*, 291 Conn. 122 (2009), *State v. Outing*, 298 Conn. 34 (2010) and the Appellate Court in *State v. Nunez*, 93 Conn. App. 818 (2006) have reviewed numerous scientific articles and seem to agree that double-blind procedures are less suggestive than the traditional procedure. If this Committee reviews the briefs in those three cases, it will not find any scientific article cited by the State criticizing double-blind procedures. However, the Courts have declined to find that

double-blind procedures are constitutionally required, leaving this issue to you, the Legislature.

There is no dispute among researchers about the efficacy of double-blind identification procedures as described in subparagraph (1) of this bill. Double-blind procedures have been adopted by numerous law enforcement agencies across the country and should be adopted without hesitation in Connecticut.

C. Sequential Procedures

In a traditional identification procedure, the witness is shown all of the photographs or all of the live persons in a line-up at the same time. The witness can then compare the images or people to find the one that looks “most like” the culprit in a process called “relative judgement”. See e.g. *State v. Ledbetter*, 275 Conn. 534 (2005). If the actual culprit is present, he or she obviously looks most like himself. However, if the culprit is not present, witnesses tend to pick the person who looks most like their memory by process of elimination rather than pick no one. The Department of Justice Task Force considered, but did not recommend sequential identification procedures in 1999. See Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000). In the intervening 12 years, additional research supports the use of sequential procedures where feasible.

To reduce this problem, in a sequential procedure, the witness is shown one image or person at a time and asked to make an absolute yes/no decision. As described in subsection (2) and (3)(C) to (F) a witness would see all of the fillers and the suspect, in a random order. If the witness made a choice early, he or she would still see the remaining images.

Opponents of this bill may direct this Court to the Supreme Court's debate about sequential procedures in *State v. Marquez*, 291 Conn. 122 (2009) and question the research supporting sequential procedures. The *Marquez* opinions refer to a 2006 study in Chicago (the Mecklenburg study) which tried to test the traditional procedures against double-blind sequential procedures. See Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (2006); Mecklenburg, *Addendum to the Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (2006).

The Mecklenburg study has never been published in a peer-reviewed scientific journal. Critics have published several articles raising concerns about its design and procedures. Even on its face, its results are startling. In two counties (Chicago and Evanston) no witness using the traditional method picked a filler instead of the police suspect --- not a single witness in 152 procedures in Chicago and an unknown number in Evanston. This suggests that there is a serious problem with the traditional method used in Illinois – no witness, no matter how bad the viewing circumstances, ever chose the wrong answer. Other simultaneous procedure studies across the country showed an average of 20.5% filler selection rate – about 1 in 5 actual witnesses choose the wrong person, perhaps due to stress, or bad viewing conditions, or the actual culprit not being in the array.

Numerous articles have been published criticizing the study's methods and results. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6, 7 (2008); State of Wisconsin Office of the Attorney General, RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES 4 (2006); Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008); Ross & Malpass, *Moving Forward: Response to "Studying Eyewitness Investigations in the Field"*, 32 LAW & HUM. BEHAV. 16, 19 (2008); Steblay, *What we Know Now: The Evanston Illinois Field Lineups*, 35 LAW & HUM. BEHAV. 1 (2011); VERMONT EYEWITNESS IDENTIFICATION AND CUSTODIAL INTERROGATION STUDY COMMITTEE REPORT 8 (2007).

The disputed Mecklenburg study does not undermine research supporting the efficacy of sequential procedures. Sequential procedures have been adopted by numerous law enforcement agencies across the country and should be adopted in Connecticut.

If, despite this testimony, the Committee remains troubled by the use of sequential procedures, CCDLA strongly recommends adopting the remainder of the general provisions and double-blind procedures in this bill and directing further study of sequential procedures as adopted in numerous other states. See RHODE ISLAND EYEWITNESS IDENTIFICATION TASK FORCE REPORT 15-16 (2010) (strongly urging police departments to adopt sequential procedures). Research would support adopting a double-blind simultaneous procedure, which has been done in Ohio, see Ohio Code § 2933.83 (Minimum requirements for live lineup or photo lineup procedures), but it would not support adopting a non-blind sequential procedure.

D. Familiarity does not Protect from Mis-Identifications

In his testimony to this Committee last year, on March 10, 2010 Chief State's Attorney Kane remarked that "Most of the eye witness identifications we get that, at least, we're comfortable with are really cases in which the witness or the victim have known the defendant, have had prior contact with the defendant and they've had sufficient contact and can pick the person out." This might suggest to the Committee that the existing eyewitness identification procedures are sufficient in the majority of cases and that this Bill is unneeded.

There are two problem with this reassurance. First, familiarity is complicated – there is a vast difference between an identification made by a close family member and one made by a near-stranger or casual acquaintance. Second, familiarity is merely a positive factor in making an identification. It does not mean that the negative factors like distance, lighting, stress, or unnecessarily suggestive procedures can be ignored. Kerstholt, et al., *The Effect of Availability on the Identification of Known and Unknown Persons*, 6 APPL. COG. PSYCH. 173, 179-80 (1993) (study of 30 co-workers, test subjects misidentified 22% of strangers photographs taken under bad viewing conditions as colleagues). Pezdek & Stolzenberg, *Non-Stranger Identification: How Accurately Do Eyewitnesses Determine if a Person is Familiar?* Paper presented at the meeting of the American Psychology - Law Society, Vancouver, Canada. (March 2010) (study of high school students, 28% misidentified class photographs of strangers as familiar person). The authors of the 2010 study concluded "surprisingly that recognition accuracy for casually familiar non-strangers is not reliably higher than that for strangers."

The proposed reforms to eyewitness identification procedures are important to all identifications made in Connecticut.

3. Conclusion.

Numerous states and law enforcement agencies have adopted the reforms set forth in this bill. The reforms are supported by solid empirical science. They are necessary to protect the innocent from being wrongfully arrested and prosecuted. On behalf of CCDLA, I urge you to pass Raised Bill #6344.

Respectfully submitted,

Lisa J. Steele, Esq.